United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1031

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pls.

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA

Plaintiff-Appellee,

- against -

SAMUEL WEISMAN,

Defendant-Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

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DEFENDANT-APPELLANT'S
REPLY BRIEF

Preliminary Statement

This brief is submitted on behalf of Samuel Weisman, defendant-appellant herein, for the purpose of replying to some of the factual statements and legal arguments made by the government in its brief. Defendant's position with respect to the arguments made at Point IV of his main brief are fully set forth therein and will not be dealt with herein. Although we will reply briefly to the government's

response to Points II and III of our main brief, we will deal herein primarily with the government's response to Point I in which defendant Weisman urges that was reversible error for the trial court to refuse to instruct the jury as to the use of the evidence concerning Weisman's previous transactions and association with Hellerman.

Reply to Statement of Facts

Although not directly relevant to the legal questions raised on this appeal, we would first like to comment briefly on the government's statement of the facts.

At pages 3 through 7 of its brief the government outlines the various events which, according to Hellerman, took place in connection with the Automated Information Systems ("AIS") manipulation prior to May 3, 1971, the date that Hellerman telephoned Weisman and successfully urged Weisman to purchase some AIS stock. We would like to emphasize that there is no evidence and the government has never asserted that Weisman had any knowledge whatever of any of these facts either before or after he received the May 3, 1971 telephone call from Hellerman.

Also, in discussing the events of May 7, 1971 having to do with Hellerman's attempt, through defendant Layne, to

place a wooden ticket for 10,000 shares of AIS with Lassoff's firm, the government states that Lassoff, in speaking to his superior, Harold Frohlich, "apparently let slip out the fact that Hellerman had referred Layne to the firm." There is no evidence that Lassoff let anything "slip." Frohlich was very clear in his testimony that Lassoff had come to him and volunteered that Hellerman had referred Layne to him (182a).* Indeed, as pointed out in our main brief (p. 9, note) Lassoff went to Frohlich on May 7 only after he had called Weisman and been told by Weisman that if he had any doubt about Layne's order he should discuss it with his firm.

We would also like to point out that many of the facts recited at pages 7 through 15 of the government's brief were expressly denied by Weisman when he took the stand.

Reply to Point I

In Point I of his main brief, defendant Weisman urges that it was reversible error for the trial court to refuse to give a limiting instruction to the jury with respect to the evidence regarding so-called prior similar acts or trans-

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* References are to pages of the Appendix.

actions. Much of the government's response (contained at pages 19-20 of its brief) is directed to the question of admissibility of this evidence. Of course, Weisman's contention that a limiting instruction was necessary is not dependent upon whether or not the evidence was admissible, although it is urged in Point II, as a further reason for reversal, that the evidence was not admissible on the government's main case.

The government first argues that defendant Weisman's request for a limiting instruction with respect to the evidence of so-called prior similar acts was properly denied because it was an oral request not made until after the court had charged the jury on November 26, 1973. This is simply not true. As pointed out in our main brief (p. 29) defendant Weisman tried, without success, to submit to the court a supplemental request to charge in this regard prior to the court's November 26th charge. The government does not deny that such an attempt was made and, indeed, could not deny it in that a copy of the supplemental request was delivered to the Assistant United States Attorney who tried the case prior to the attempted submission to the court. Therefore, it is quite surprising that the government in the footnote at page 22 of its brief, although not expressly denying that such an attempt was made, attempts to create a doubt in this regard.

Annexed hereto as an appendix is a copy of the written request which was presented to the court but rejected prior to the opening of the session on November 26th. The supplemental request to charge is not physically part of the record because it was not accepted by the court and, therefore, was not physically filed. Should the court deem it critical that the written supplemental request be a part of the record, then we respectfully request that permission to file such supplemental request be granted nunc pro tunc.

The reason the supplemental request to charge was not submitted to the court until November 26th is explained in the record. Thus, defense counsel explained, after orally requesting the charge in this regard, that it was "occasioned principally by the emphasis that was placed by [Assistant United States Attorney] Walker in his summation" on the so-called prior similar acts. (411a)

In view of the above, we respectfully suggest that the authorities cited at page 22 of the government's brief for the proposition that an oral request to charge can properly be denied as untimely if not made until after the jury has been charged, are inopposite.

The government next argues that the requested charge was properly refused because it did not advise the jury that

the testimony as to so-called prior similar acts "could be considered by it only on the question of Weisman's knowledge and intent" but rather advised only that it "could not be considered by the jury in determining whether Weisman is guilty or innocent of the offense charged in this indictment." (Government's Brief, p. 22) Thus, the government urges that the requested charge was properly refused in that it "clearly did not reflect the law." (Government's Brief, pp. 22-23)

First, the government has not accurately recited the requested charge. The written supplemental request, as set forth in the appendix hereto, after outlining in detail the evidence of the so-called prior similar acts stated:

> "I charge you that even if you should find that Mr. Weisman participated in one or more of these schemes, that fact is not any evidence or proof whatever that, at a later time, Mr. Weisman committed the offense charged in the indictment. Evidence as to such a fact may not therefore be considered by [you in] determining whether Mr. Weisman committed the offense.
>
> Similarly, if you find that Mr. Weisman knew that Mr. Hellerman did engage in manipulative schemes prior to May of 1971 or knew of accusations or indictments against Mr. Hellerman in connection with his dealings in securities, that fact is not any evidence or proof whatever that Mr. Weisman committed the offense charged in the indictment and evidence as to such a fact may not be considered by you in determining whether Mr. Weisman committed the offense charged."

The oral request was similar in nature:

> "I ask your Honor to charge that even if the jurors should find that Weisman knew of, or even to the extent of Hellerman's testimony, had such participation in any of those prior events, those facts are not evidence or proof whatever that at a later time in connection with Automated Weisman committed the offenses charged in this indictment.
>
> Evidence as to such facts may not, therefore, be considered by the jury in determining whether Weisman is guilty or innocent of the offense charged in this indictment.
>
> Similarly, I ask your Honor to charge that if Weisman knew that Hellerman did engage in manipulative schemes before May of 1971 or knew of accusations or indictments against Hellerman in connection with his dealings in securities, that that fact of his knowledge is not evidence or proof that Weisman committed the offenses charged in this indictment and should not be considered by them in determining whether Weisman is guilty or innocent of those offenses."

We respectfully suggest that the above requests properly reflect the rule that all possible safeguards should be taken to assure that a jury will not imply or conclude that the accused, having engaged in prior similar acts or prior criminal conduct probably committed the criminal acts with which he is actually charged. See United States v. Byrd, 352 F 2d 570, 574 (2d Cir., 1965).

Even assuming arguendo that the requested charge was

incomplete, we respectfully suggest that it was sufficient to put the court on notice that a limiting instruction was desired by defendant Weisman and, having been given such notice, it was incumbent upon the court to charge the jury in this regard. Orloff v. United States, 153 F 2d 292 (6th Cir., 1946) emphasizes that while the defense must put the court on notice that a limiting charge is desired, through a request for some charge that would restrict the jury's consideration of the evidence of other crimes as prior transactions, a formally correct charge is not needed in order to obligate the court to give the proper instruction. The defendant in Orloff apparently requested an instruction at trial that the testimony was admissible "only on the question of identification of the defendant and not on the question of guilt or innocence," (153 F 2d at 294) and shifted his argument on appeal to the contention that the evidence was "too remote in time" and that the jury should have been instructed to disregard it.

The Appellate Court did not find either contention tenable, but held that the defendant's objections directed toward such evidence were sufficient to trigger the court's responsibility to deliver the correct limiting charge to the jury. The court was bound to constrict the jury's consideration of the evidence to the issue of intent:

> "However, the testimony was admissible only upon the existence of fraudulent intent. While the request to charge was not a precise statement of the law, it fairly apprised the court of the point made and required the court to charge the jury to consider the testimony only upon the question of guilty knowledge and intent to defraud the government. The failure to give this instruction constituted prejudicial error for which a new trial must be ordered. The appellant was entitled to a correct statement of the law from the court." (153 F 2d at 295 — emphasis added; citations omitted)

As previously noted, Weisman submitted a request to charge that recapitulated the testimony of Hellerman on previous manipulative stock transaction in which the defendant allegedly took part as well as the defendant's rebutting testimony, and then instructed the jury that such evidence is not evidence that the defendant actually committed the offense charged in the indictment. This submission clearly put the court on notice that the defendant desired a limiting instruction to contain the prejudicial impact of Hellerman's testimony on other "crimes."

The government next argues that the failure to give a limiting instruction does not warrant a reversal in that the only issues involved in this case was the question of Weisman's knowledge and intent and, therefore, the jury could not have used this evidence of "prior similar acts" for any other pur-

pose. How the government can exclaim with certainty what went on in the jury's deliberations is nowhere explained. Indeed, under the facts of the instant case, we respectfully suggest that one must conclude that the jury used this evidence of prior similar acts as the sole basis for its verdict and convicted the defendant not because it felt the government had proven its case but, because it felt that the defendant must be guilty of the charges contained in the indictment in view of his prior transactions or association with Hellerman.*

The government flippantly dismisses the Orloff and Montgomery cases cited at pages 24-25 of our main brief and states that defendant Weisman has not cited a single case which supports its argument that it was reversible error not to give a limiting instruction under the facts of this case. However, we respectfully submit that the particular facts involved in an individual case have nothing to do with whether a limiting instruction is necessary. Rather, we suggest that, when requested, a limiting instruction is always required.

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* As pointed out at page 28 of our main brief the evidence of Lassoff's participation in and knowledge of the AIS manipulation scheme was much more extensive than the evidence against Weisman in this regard. Thus the jury must have placed heavy reliance upon the evidence of Weisman's prior dealings and association with Hellerman.

To state the rule governing the admissibility of such evidence, i.e., that it is admissible except when offered solely to prove criminal character, (See United States v. Papadakis, Dkt. No. 74-1847 [2d Cir., January 10, 1975] Slip Op. at 1243) is to state the rule requiring a limiting instruction. The absence of any case in this Circuit which turns on the failure to give a limiting instruction is explained, we suggest, by the fact that, when requested, such a limiting instruction is routinely given as a matter of course. This is evident by the passing reference to a limiting instruction by the court in the various cases cited at pages 25-26 of our main brief and is made clear by this court's recent decision in United States v. Gerry, Dkt. No. 74-2100 (2d Cir., March 28, 1975) where, in discussing evidence of prior similar acts states, the court stated:

> "Therefore, when the testimony of these prior similar acts was offered not solely to show criminal character but to show that a race could be fixed by one or two drivers it was admissible with a proper limiting instruction. Such an instruction was given in this case." (Slip Op. at 2599; emphasis added)

Finally, the government argues that Weisman is "entitled to no relief" in that the evidence of "prior similar acts" was clearly relevant, not only to establish Weisman's knowledge and intent but, also, was "admissible to prove the

existence of the conspiracy." This contention, of course, ignores the facts that Weisman's argument in this regard is not that the evidence was inadmissible (although it is urged that such evidence was not admissible on the government's main case—see Point II) but rather that, once admitted, a limiting instruction was required. Nor has it ever been suggested that the "prior similar acts" recited by Hellerman were even remotely related to the conspiracy charged in the indictment herein. United States v. Papadakis, supra, cited at page 26 of the government's brief for the proposition that "under these circumstances...the refusal to give a limiting instruction [was] entirely proper," is clearly inapplicable in that there the court was careful to point out that no limiting instruction was requested (Slip Op. at 1244).

In view of the foregoing and for all of the reasons discussed in Point I of our main brief, we respectfully suggest that the trial court's failure to give a limiting instruction with respect to the evidence of the so-called prior similar acts constituted reversible error.

Reply to Point II

Defendant Weisman urges at Point II of his main brief that the admission of evidence of so-called prior similar acts on the government's main case constituted an abuse of discretion in that (a) such evidence was not needed in order for the government to make out a prima facie case and (b) such evidence was supplied by Weisman's main accuser. In support of his contention in this respect, Weisman relies primarily on this court's decision in United States v. Byrd, 352 F 2d 570 (2d Cir., 1965) and United States v. Gardin, 382 F 2d 601 (2d Cir., 1967), which are discussed in detail at pages 34 through 37 of our main brief.

In order to avoid the teachings of Byrd and Gardin the government argues that it is "perfectly apparent" that the "only real issue in this case was whether Weisman knowingly aided Hellerman in his manipulation of Automated or was simply an innocent investor." This argument begs the question for it may have been perfectly apparent to everyone from the outset that the only question was that of knowledge and intent and this would still, under Byrd, not have permitted the introduction of the highly prejudicial evidence of prior similar acts.

There clearly was no need for the introduction of the prior transaction evidence on the government's main case. Hellerman testified on direct that he told Weisman of the manipulation scheme involving AIS. Like in Byrd the evidence of prior similar transaction was merely cumulative to the testimony given by the same witness on the issue of knowledge and intent and, as the court explained in Gardin, to add to this direct evidence of intent "the same witness' recital of another similar crime, opened the door to prejudice and supplied little or nothing of probative worth, because proof of the element of intent...was bound to turn upon what the triers thought about the witness' credibility" (382 F 2d at p. 604).

For the foregoing reasons as well as those discussed at Point II of our main brief, we respectfully suggest that the trial court abused its discretion when it admitted on the government's main case, evidence of so-called prior similar acts.

Reply to Point III

In its answer to Point III of defendant Weisman's brief, which urges that the government failed to establish the use of any means or instrumentality of interstate commerce in

respect of Count III of the indictment, the government argues that there was proof of the use of the mails.

Although defendant Weisman did stipulate that a confirmation slip was sent to him in connection with his purchase of AIS stock on May 3, 1975 (752),* this was not one of the mailings recited in Count III of the indictment to support jurisdiction. Count III of the indictment listed three specific mailings and it was conceded by the government at trial that there was no proof in regard to these three alleged mailings (757).*

Conclusion

For all of the foregoing reasons, as well as those discussed in our main brief, it is respectfully submitted that a new trial should be ordered with respect to the

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* These references are to the trial transcript.

first count of the indictment and that judgment of acquittal should be directed with respect to the third count.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL REQUEST NO. 1

WEISMAN'S ALLEGED PARTICIPATION AND KNOWLEDGE OF HELLERMAN'S PARTICIPATION IN OTHER MANIPULATIONS

You have heard much testimony with respect to the fact that Mr. Weisman knew that Mr. Hellerman had been involved in other schemes designed to manipulate securities prior to the purchase by Mr. Weisman of the Automated Information Systems stock. In fact, Mr. Hellerman testified that Mr. Weisman purchased stock in Tabby's after being informed by Hellerman that he was manipulating that stock. Mr. Weisman admits purchasing Tabby on Hellerman's recommendation but denies being told or knowing that Hellerman was involved in a scheme to manipulate the price of Tabby's stock

Mr. Hellerman has also testified that he spoke to Mr. Weisman about two other stocks, Imperial Investment and Belmont Franchising and that he told Mr. Weisman he was manipulating the price of those stocks. Mr. Weisman has denied ever speaking to Mr. Hellerman about Imperial Investment and, although he admits having been told about Belmont Franchising by Mr. Hellerman, denies being told that there was any manipulation.

Also, there has been testimony that Mr. Weisman represented Mr. Hellerman on one occasion in a proceeding instituted in the

early 1960's by the Attorney General of the State of New York and that Mr. Weisman also accompanied Mr. Hellerman to Mr. Morvillo's office at the time of the investigation into Imperial Investments.

Finally, Mr. Hellerman has testified that he gave Mr. Weisman a copy of the Imperial indictment, a fact which Mr. Weisman denies.

I charge you that even if you should find that Mr. Weisman participated in one or more of these schemes, that fact is not any evidence or proof whatever that, at a later time, Mr. Weisman committed the offense charged in the indictment. Evidence as to such a fact may not therefore be considered by your determining whether Mr. Weisman committed the offense.

Similiarly, if you find that Mr. Weisman knew that Mr. Hellerman did engage in manipulative schemes prior to May of 1971 or knew of accusations or indictments against Mr. Hellerman in connection with his dealings in securities, that fact is not any evidence or proof whatever that Mr. Weisman committed the offense charged in the indictment and evidence as to such a fact may not be considered by you in determining whether Mr. Weisman committed the offense charged.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, *against* SAMUEL WEISMAN, Defendant-Appellant.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 16th *day of* April 1975 ~~XXXX~~ *at* Office of the U.S. Attorney General Foley Square, N.Y. N.Y.

deponent served the annexed Reply Brief *upon*

Paul J. Curran

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 16th

day of April 1975 ~~XXXX~~

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977